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No. 75-1506

In the Supreme Court of the United States

OCTOBER TERM, 1975

HONDO DRILLING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-13a) is reported at 525 F. 2d 864. The decision and order of the National Labor Relations Board (Pet. App. 14a-58a) is reported at 216 NLRB No. 32.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a-14a) was entered on January 30, 1976, and a petition for rehearing was denied on February 26, 1976. The petition for a writ of certiorari was filed on April 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that petitioner lacked a reasonable basis for believing that the union certified as representative of its employees no longer enjoyed majority support and thus that petitioner violated the National Labor Relations Act by withdrawing recognition from the union.

STATEMENT

1. Petitioner is one of approximately 60 oil well drilling contractors operating in the Permian Basin of Texas and New Mexico (Pet. App. 2a). In 1967, the Board certified Local 826, International Union of Operating Engineers, AFL-CIO ("the Union") as the bargaining representative for petitioner's drilling employees, pursuant to its special election formula for the Permian Basin drilling industry (Pet. App. 20a-21a).[1] To test the Union's certification and the Board's *Hondo* rule, petitioner refused to bargain until 1970, when the court of appeals sustained the reasonableness of the rule and enforced the Board's bargaining order. *National Labor Relations Board* v. *Hondo Drilling Company*, 428 F. 2d 943 (C.A. 5). Thereafter, petitioner and the Union engaged in contract talks for more than a year, when petitioner filed an election petition challenging the Union's majority status. A second election was held, which the Union won by a 28 to 2 margin, with 2

[1]This formula, known as the *Hondo* rule, was first developed by the Board in a case involving petitioner. *Hondo Drilling Co.*, 164 NLRB 416, 417, enforced, *National Labor Relations Board* v. *Hondo Drilling Company*, 428 F. 2d 943 (C.A. 5). See also the Board's brief in opposition to the petition for a writ of certiorari in No. 75-1505, pp. 2-3, n. 1, a copy of which is being sent to counsel for petitioner.

challenged ballots. On March 3, 1972, the Union was again certified by the Board as the bargaining representative of petitioner's employees (Pet. App. 21a-22a).

Negotiations between petitioner and the Union commenced in March 1972 but were unable to produce an agreement (Pet. App. 23a). In September 1972, petitioner, at the Union's request, prepared a proposed agreement, but the employees refused to accept certain of its terms (Pet. App. 25a-26a). Thereafter, in August 1973, while negotiations continued, petitioner announced its unilateral decision to grant a special "bottom hole" bonus to its employees. The Union learned of this action on August 16 and immediately protested that petitioner's actions involved a mandatory subject of bargaining. Counsel for petitioner responded that the bonus was not a bargainable matter, and petitioner proceeded to grant it to certain of its employees without further consultation with the Union (Pet. App. 32a-35a).

On October 17, 1973, petitioner's counsel informed the Union of petitioner's intention to grant an across-the-board wage increase to its employees, effective within a few days (Pet. App. 35a-36a). On learning of this proposed action, the Union protested, objecting "to the pattern you have established in only notifying the Union two or three days in advance of the effective date of when the Company proposes a change" (Pet. App. 36a). The Union also voiced its displeasure with a wage increase in the continued absence of a complete contract (Pet. App. 36a-37a).

On October 31, 1973, petitioner submitted a new proposed agreement which included larger wage increases than had previously been proposed (Pet. App. 37a-38a). The Union expressed dissatisfaction with several of the

contract proposals, including one (never before the subject of discussion) that expressly reserved to petitioner the right unilaterally to grant wage increases to meet competition (Pet. App. 37a-38a). In response to petitioner's inquiry, the Union explicitly stated that it would not consent to putting the increases into effect immediately but that it would call an employee meeting to vote on the proposed contract. The Union thereafter advised the employees to reject the contract for several reasons, including petitioner's proposed retention of unilateral control over the granting of wage increases (Pet. App. 39a).

The employees voted to reject petitioner's contract offer on November 7, 1973. Shortly thereafter, the Union informed petitioner of this decision and concurrently submitted its own counterproposals, including some new demands for consideration. The Union also requested petitioner to select a date for further negotiations (Pet. App. 39a-40a). Petitioner's response was given on November 14, when it withdrew recognition from the Union, alleging that the Union did not represent a majority of the employees (Pet. App. 40a).[2] On the same day, petitioner unilaterally implemented the same wage increases it had proposed on October 31; on December 3, petitioner granted its employees another wage increase without notice to or consultation with the Union (Pet. App. 40a-41a).

2. The Board, adopting the decision of the Administrative Law Judge, held that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations

[2]Petitioner thereupon became the third of four Permian Basin drilling contractors represented by the same attorney to withdraw recognition from the Union on that basis. See the Board's brief in opposition in No. 75-1505, p. 5, n. 3.

Act by withdrawing recognition from and refusing to bargain with the Union (Pet. App. 14a-15a, 46a-54a). In so holding, the Board rejected petitioner's contention (Pet. 14) that it had a "good faith" doubt of the Union's continued majority status (Pet. App. 46a-52a).

Specifically, the Board rejected petitioner's reliance on the high rate of employee turnover characteristic of this industry, concluding (as it had previously ruled in *Leatherwood Drilling Co.*, 209 NLRB 618, enforced, 513 F. 2d 270 (C.A. 5), and *Brahaney Drilling Co.*, 209 NLRB 624, enforced, 513 F. 2d 270 (C.A. 5)), that the ordinary presumption that replacements will continue to support a union to the same extent as their predecessors is equally applicable to the Permian Basin drilling industry (Pet. App. 49a and n. 34).

The Board also rejected petitioner's reliance on alleged employee dissatisfaction, finding the record barren of any such evidence (Pet. App. 49a). In this respect, petitioner had produced no testimony by employees and had relied solely upon the testimony of Drilling Superintendent Walter Frederickson and Supervisor Thomas Richey. Frederickson merely testified that he had heard "reports" from supervisors that the employees had been asking when they would get wage increases (Tr. 199-203, 208). Similarly, while Richey testified that, during the months of October and November 1973, certain employees had complained that they were "tired of being run around" and that "they wanted a raise, union or not" (Tr. 261-272),[3] Richey further testified (Tr. 274) that employees in the industry regularly inquired about receiving wage increases during the fall months, not

[3]"Tr." refers to the transcript of testimony before the Board.

because of dissatisfaction with the Union but because area drilling contractors characteristically granted wage increases at that time of year. The Board concluded that the alleged employee remarks did not indicate "displeasure" with union representation, noting that in the November 1973 union meeting the employees had rejected petitioner's latest contract proposal containing a 40-cent hourly wage increase (Pet. App. 51a).

In addition, the Board rejected petitioner's reliance on Frederickson's testimony (Tr. 208-209) that he got the "impression" from "talking to" supervisors that the Union had unsuccessfully attempted to persuade employees to stop working for or to refuse employment with petitioner. The Board found that "these alleged reports [were] wholly unsubstantiated by any probative evidence" (Pet. App. 50a).[4]

Finally, the Board concluded that, contrary to petitioner's contention (Pet. 16), there was "nothing in the Union's conduct at [the October 31, 1973 bargaining session] or in the new proposals [subsequently submitted to petitioner] which could reasonably suggest to the [petitioner] that its employees had rejected union representation" (Pet. App. 50a). Regarding the Union's conduct, the Board observed (Pet. App. 50a) that "[t]he most that can be said is that the Union was seeking

[4] Contrary to petitioner's contention (Pet. 17), Frederickson's testimony was not corroborated by Supervisor Richey, who did not testify on this issue. See Tr. 256-286. The Board also noted (Pet. App. 50a-51a) that, even if petitioner's position were factually supportable, "a union's unsuccessful efforts to persuade employees to withhold services from their employer does not necessarily indicate that the employees are no longer interested in union representation." See, *e.g.*, *Retail, Wholesale and Department Store Union* v. *National Labor Relations Board*, 466 F. 2d 380, 393 (C.A. D.C.).

better contract terms than those [petitioner] was offering. Indeed, [petitioner] itself was seeking to improve its bargaining position when at the October 31 meeting it presented its last contract proposal containing several new terms."[5]

The Board therefore ordered petitioner, *inter alia*, to bargain with the Union upon request (Pet. App. 55a-57a). The court of appeals upheld the Board's decision and enforced its order, finding that substantial evidence on the record as a whole supported the Board's conclusion that petitioner had failed to sustain its burden of proving a good faith doubt as to the Union's majority status (Pet. App. 3a, 7a-14a).

ARGUMENT

The sole question presented in this case is whether the Board properly concluded that petitioner lacked a reasonable basis for believing that the certified union representative of its employees no longer enjoyed majority support. That issue is identical in all respects to

[5] The Board made the following additional findings concerning petitioner's withdrawal of recognition from the Union after these events (Pet. App. 48a):

> This was the first time [petitioner] had ever raised the question of the Union's majority status since the Union's second certification 20 months earlier, although the Union's status apparently had not changed much during the intervening period. Moreover, the withdrawal of recognition occurred only after the Union had indicated its unwillingness to accept all the terms embodied in [petitioner's] contract proposal presented to the Union at the October 31, 1973 bargaining session, but instead, put [petitioner] on notice that it intended to submit additional proposals of its own. Furthermore, the withdrawal of recognition followed immediately after the Union in its letter of November 12 advised [petitioner] of its membership's rejection of [petitioner's] October 31 contract proposal and listed its additional counterproposals.

the contention presented in *A.W. Thompson, Inc.* v. *National Labor Relations Board*, No. 75-1505, and the legal and factual arguments underlying petitioner's claim are essentially the same as those advanced in *Thompson*. Accordingly, for the reasons set forth in the Board's brief in opposition in No. 75-1505, the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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